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Sup. Ct. No. 05-2-09617-4

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STATE OF WASHINGTON
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COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

ANDREW L. MAGEE, Defendant-Appellant,

v.

STATE OF WASHINGTON, Plaintiff-Respondent

APPELLANT OPENING BRIEF

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I ASSIGNMENT OF ERROR

Whether the District Court erred as a matter of law (Clerks Papers (CP 32); whether the Superior Court erred in affirming the District Court and denying motion to modify, (CP 62, 83) (A-1, A-2) and; whether the Appeals Court Commissioner erred in affirming the Superior Court's decision(s). (CP 92-96)

II ISSUES PRESENTED FOR REVIEW

Mr. Magee respectfully requests that his appeal be granted on the following grounds:

LEGAL ERROR

1. The issuing officer violated RCW 46.63.030 (Notice of Infraction – Issuance,) because the alleged

facts did not occur in the presence of the issuing officer, or in the presence of another officer requesting issuance.

2. Mr. Magee's due process rights were violated when he was unlawfully detained for a traffic violation when no element of the violation was witnessed by the issuing, or any other police officer.

3. That the Superior Court erred as a matter of law when it affirmed the decision of the District Court. The District Court erred as a matter of law because the District Court's factual finding *excluded* the allegation against Mr. Magee from falling under the alleged Revised Code of Washington (RCW) violation. Rather, the RCW restricts application of the District Court's factual finding to a separate, lesser, not-included, not-charged violation (a parking violation.)

4. Mr. Magee was denied procedural due process when the District Court neglected to perform a review of

his case to qualify for a dismissal with costs/deferred finding.

5. The District Court relied upon improperly admitted hearsay, (in fact, double-hearsay) when it allowed the voluntary testimony of a Washington State Patrol Trooper in violation of the rules of evidence and IRLJ 3.1(b).

6. As a matter of law, parking on the shoulder of the on-ramp in order to attempt to jump-start a friend's stalled car was not a moving violation.

7. The assertion that Mr. Magee admitted driving the wrong way in the travel lanes of Highway 512 was based on a physical impossibility, for there is no on-ramp that would allow someone to go the wrong way. Mr. Magee, accordingly, could not and did not admit that he was traveling the wrong way, which was expressly confirmed by the wording of the citation that was issued, (which made no mention of such an admission.)

FATAL PROCEDURAL ERROR

8. Mr. Magee timely and properly filed his Motion for Discretionary Review with this Court on January 20, 2006. The Court of Appeals Division II State of Washington mailed a letter dated January 30, 2006, (A-3) to Mr. Magee, Defendant-Appellant, and to the State of Washington, Plaintiff-Respondent, acknowledging the timely and properly filed Motion for Discretionary Review by Mr. Magee on January 20, 2006.

The Court, in no uncertain terms, also notifies Respondent that a Response from them is mandatory and that the deadline for serving and filing the response was February 6, 2006. As of February 6, 2006, Respondent had failed to comply with the specific instructions of this Court, and did not serve, nor confirm filing of, a Response

9. That the Superior Court erred when it considered the arguments of the Respondent despite the fact that Respondent failed to timely file a responsive brief in violation of RALJ 7.2(b) - TIME FOR FILING BRIEFS, and RALJ 10.3 – EXTENSION AND REDUCTION OF TIME. In addition to the Superior Court's error granting Respondent the opportunity to oppose Mr. Magee's appeal, the Superior Court erred when it did not rule on Mr. Magee's rule-compliant, timely, and properly filed motion pursuant to Respondents violation of RALJ 10.3.

III STATEMENT OF THE CASE

A. Introduction

On April 9, 2005, Mr. Magee, at the request of his friend, Mr. Kenneth Hershey, drove Mr. Hershey to his car already parked on the shoulder of the Pioneer street on-ramp (in Puyallup) which eventually enters into Highway 512. Mr. Hershey's car had stopped running

the day before, (April 8, 2005.) Mr. Hershey had been back to his car in a separate vehicle the morning of April 9, 2005, and had re-started his car. Believing that his car would re-start, Mr. Hershey left and called Mr. Magee and asked to be driven to his car so they could both drive away. Upon arrival, however, Mr. Hershey's car would not start despite repeated attempts which drained the battery. Mr. Magee offered to provide a "jump-start" so Mr. Hershey's car could have a chance to start and depart. Mr. Magee, employing both his turn signal and emergency flashers, and traveling the correct direction, safely pulled back into the on-ramp lane, traveled approximately two car-lengths, and turned his car back onto the shoulder of the on-ramp parked directly in front of Mr. Hershey's car.

Afterwards, while parked on the shoulder of the on-ramp, a Washington State Patrol Trooper, with lights on, arrived and detained Mr. Magee. The Trooper asked

Mr. Magee if he was the car driving the wrong way in the eastbound lanes of highway 512. Mr. Magee responded, "no." The Trooper alleged that "calls" had been received about a car going the wrong way in the eastbound lanes of highway 512. (CP 26) Mr. Magee had never been in, much less traveled in, (nor the wrong way,) the eastbound lanes of highway 512. The Trooper, (as confirmed at the contested hearing,) never witnessed what was alleged, nor was it alleged that any other officer saw, or requested that a citation should be issued for driving the wrong way in the eastbound lanes of highway 512. (CP 26-28) Nevertheless, the Trooper issued Mr. Magee a citation for a negligent driving in the second degree under RCW 46.61.525 (Wrong Way on Freeway). (CP 19-20) (CP 6,7,8) (A-3)

B.

Mr. Magee timely and properly requested a contested hearing. Prior to that hearing, Mr. Magee

timely and properly filed a demand for discovery, to include a request for the name and address of any and all witnesses the State planned on using. Mr. Magee was provided only a copy of the citation and it's "backside" containing a signed under the penalty of perjury report which indicated falsely that the Trooper had observed Mr. Magee's car going the wrong way on Highway 512. (CP 19, 20) (A-3)

At his hearing, Mr. Magee, via examination of the Trooper, confirmed to the District Court that the Trooper had seen nothing, and that Mr. Magee was indeed only parked on the shoulder of the on-ramp lane. (CP 26-28) (A-3,4,5) Over timely and properly made objections, the Trooper voluntarily introduced that "calls" had been received of an unidentified car going the wrong way in the eastbound lanes of highway 512. (CP 26) The District Court, nevertheless, allowed and considered these statements.

Mr. Magee, testifying to the events of April 9, 2005, conceded the reality of what took place to the court as described *supra*. (CP 31-32) Mr. Magee, then, presented the sworn testimony of Mr. Hershey, an eyewitness, who is a member in good standing of the Bar, who wholly corroborated Mr. Magee's testimony. (CP 31) The District Court, without informing Mr. Magee of, nor performing a review of his matter as eligible for a deferred finding, brought the proceedings to a close, made its determination, and found Mr. Magee as having committed a violation of RCW 46.61.150 (Wrong Way on Freeway.) (CP 31-32)

Mr. Magee, timely and properly filed his notice and motion for a RALJ appeal. (CP 2-3) Subsequently, Mr. Magee received a letter, also filed with the Superior Court, from the prosecuting attorney (Respondent) for Pierce County acknowledging the appeal. (CP 4) (A-4) Moreover, in that letter, Respondent explicitly set forth

the standard for the application of the RALJ rules governing the timely and properly filing of briefs in the matter, and the dispositive result for violating the RALJ rules. (CP 4) (A-4)

Succinctly, Respondent communicated to Mr. Magee, and the Superior Court, that Mr. Magee's brief *must* be filed by a certain date, and, that *Respondent's* brief *must* be filed by a certain date subsequent. Finally, Respondent stated clearly that failure to file a timely brief would result in this matter being set before the Superior Court for "action," *i.e.*, a dismissal, to be taken. (CP 4) (A-4)

Mr. Magee timely and properly filed his brief. (CP 5-22) Upon the specific date determined by the RALJ for Respondent to file their brief, no brief had been filed. Mr. Magee - as Respondent indicated it would if Mr. Magee filed late - set the matter before the Superior

Court to be heard unopposed, and accordingly, have his request/appeal granted. (CP 46-52)

Still with no brief filed, and with the hearing date approaching (falling a full-four-weeks after Respondent's deadline,) Respondent called Mr. Magee and left a recorded message. In this message, Respondent, rather than asking for an agreed upon extension for the time to file a brief, made an obvious attempt to dupe Mr. Magee. Instead of acknowledging, and taking responsibility for grossly violating RALJ 7.2(b), Respondent, referring in no way to, and making no mention whatsoever of the standard and framework of their letter, told Mr. Magee that *he* should ask the Superior Court for a continuance so that Respondent could file their brief. Approximately five-weeks, (more than 100% in excess of the actual deadline to file their brief,) and without indicating to the Clerk of the Court, nor to the Court itself that it's brief

was in gross violation, did Respondent file a brief. (CP 33-41)

At the RALJ hearing that Mr. Magee had requested, Mr. Magee moved the Superior Court to find Respondent in violation of the RALJ, and to have his appeal heard and ruled on unopposed. The Superior Court was unaware of Respondents explicit and gross violation of the RALJ. The Superior Court, in response, deviated from following the timely and proper course set by Mr. Magee to have his matter heard then and there unopposed, and *sua sponte*, continued the hearing. (CP 45) In that time, Mr. Magee, while waiving no claim, filed a reply brief (and a separate written motion to the Superior Court regarding Respondent's explicit and gross violation of the RALJ.) (CP 46-52) At the new hearing, the Superior Court affirmed the District Court, and did not rule on Mr. Magee's separate motion. (CP 62-63) Mr. Magee filed a Motion for Reconsideration. (CP 66-

80) The Superior Court re-affirmed the prior decision and again did not rule on Mr. Magee's motion regarding the RALJ violation by Respondent. (CP 82, 86)

Mr. Magee, then, timely and properly filed a Motion for Discretionary Review with this Court. (CP 84-85) Subsequent to that filing, the Court sent a letter (CP 90-91) (A-5) to both parties, acknowledging the filing by Mr. Magee, and setting forth the rules, and due date(s) for any further filings. The Court spells it out clearly in its letter that failure to comply would result in sanctions against the violating party.

Respondent failed to comply with the specific rule, and timing thereof, regarding serving and filing a Response with the Court, resulting in Mr. Magee being served beyond the deadline set by the Court. Mr. Magee, then, both brought this once-again violation of the explicit rules as procedure of this Court, (and Superior

Court,) to the attention of the Court, and, moved the Court to have his motion heard unopposed.

Prior to the Court's ruling(s), Respondent then filed and submitted a document to the Court declaring that Mr. Magee's account of how he was served (by United Parcel Service (UPS)) was in error, and that the timing of service was correct.

As submitted by counsel for Respondent, contained in Respondents declaration, is a sworn, under penalty of perjury, statement of the person purporting to be the staff-person from Respondent's office who handled the service and filing of Respondents Response in support of counsel for Respondents declaration.

Resolving any question, and revealing as falsehoods the representations to this Court by Respondent, Mr. Magee provided, and filed with this Court, a photo-copy (original available upon request) of the envelope in which Respondent's Response was

contained, clearly indicating who it was sent by, when it was sent, and by whom it was delivered, to Mr. Magee's office. (A-6) The envelope contained no U.S. Postage, but rather, had affixed to it a UPS shipping sticker produced by an "*in-house*" UPS machine within the Pierce County mailing department.

Additionally, Mr. Magee submitted a print-out from UPS showing a "tracking" of the envelope, namely, when it was delivered, in violation of the Court rules. (A-7) Lastly, Mr. Magee submitted a photocopy of the sign-in-sheet for deliveries to his office, showing that Respondents delivery was beyond the Court mandated deadline, and was delivered by UPS. (A-8)

Mr. Magee now appeals to this Court to have this matter reviewed, and have the affirmation by the Superior Court of the decision of the District Court reversed.

IV ARGUMENT

The following arguments are enumerated to correspond to the Issues Presented for Review contained in section A, *supra*, and are as follows:

LEGAL ERROR

1. Mr. Magee was issued the citation in question unlawfully. As contained in Mr. Magee's timely and properly filed Motion for Reconsideration before the Superior Court, RCW 46.63.030 – Notice of Infraction – Issuance – Abandoned Vehicles – states: “(1) A law enforcement officer has the authority to issue a notice of traffic infraction (a) When the infraction is committed *in the officer's presence*; (b) When the officer is acting upon the request of a law enforcement officer in whose

presence the traffic infraction was committed.” RCW 46.63.030.

The District Court, at the contested hearing stated, “I’m convinced that she [Trooper] did not see you driving except for at her instruction.” (CP 30)

It is not in dispute that the Trooper neither saw Mr. Magee driving the wrong way in the eastbound lanes of State Route 512, nor issued the citation at the request of a law enforcement in whose presence the traffic infraction was committed.

It is clear, therefore, that the citation issued to Mr. Magee was issued unlawfully.

Additionally, it was alleged and submitted that Mr. Magee admitted the violation to the Trooper. The fact that any “admission” would have had to have come after the unlawful stop/detention of Mr. Magee under RCW 46.63.030. This undocumented, unsupported “admission” is in direct contradiction to the wording

printed on the citation representing the circumstances under which a citation may be lawfully issued. Mr. Magee's signature contained in a box indicating that the signor is doing so "without admitting to having committed each of the above offenses. . ." (CP 19)

(A-3)

2. The detention of Mr. Magee, resulting in the issuance of the citation, was in violation of the law under *Campbell v. Department of Licensing*, 31 Wn. App. 833, 644 P.2d 1219 (1982), which requires that in the absence of any corroborative information or observation, a police officer is not authorized to stop a vehicle.

Campbell v. Department of Licensing, 31

Wn. App. 833, 644 P.2d 1219 (1982) states:

ISSUE

When a citizen informs a police officer that a particular vehicle is being driven [the wrong way] by a drunk driver, is the officer then entitled, without more, to stop the vehicle?

DECISION

CONCLUSION

In the absence of any corroborative information or observation, a police officer is not authorized to stop a vehicle on the sole basis that a passing motorist points to a vehicle and announces that it is being driven [the wrong way] by a drunk driver.

Campbell v. Department of Licensing, 31 Wn. App. 833

The Court of Appeals for the State of Washington goes on to state that:

The passing motorist in this case provided no factual information from which the officer could assess, *as he must*, the probable accuracy of the motorist's conclusion.¹ Although the citizen did describe and point out the automobile to the officer, that is not the kind of underlying fact which justifies a stop and detention.² In an apparent attempt to corroborate the tip, the officer followed the suspect for some distance but observed no conduct indicative of drunk driving. Thus, the officer could not have subsequently developed a well founded suspicion through his own independent investigation. It follows that the officer's initial stop and detention was unlawful.

31 Wn. App. 833

Timely and properly filed with the Superior Court,

Mr. Magee's Motion for Reconsideration with the

¹ STATE v. SIELER, SUPRA.

² WHITELY V. WARDEN, 401 U.S. 560, 567, 28 L. Ed. 306, 91 S. Ct. 1031 (1971); STATE v. LESNICK, 84 Wn. 2d 940, 943, 530 P.2d 243 (1975); STATE v. MCCORD, 19 Wn. App. 250, 254-56, 576 P. 2d 892 (1978).

Superior Court points out that under RCW 46.61.575 – Additional Parking Regulations – that, “. . . every vehicle stopped or parked upon a one-way roadway shall be so stopped or parked parallel to the curb or edge of the roadway, in the direction of authorized traffic movement” and also states that it applies, “with respect to *highways* under his or her [secretary of transportation] jurisdiction.” RCW 46.61.575

The Trooper, at the contested hearing, when asked, “you [Trooper] in fact never saw me [Mr. Magee] do what you’re accusing me of?” responded, “No.” (CP 26) Mr. Magee then pointed out to the Trooper, and the District Court that “only having observed my car *parked* and *only parked*, you [Trooper] *never* witnessed my car driving on the 512 correct?” and the Trooper affirmatively responded, “Not until I advised you to leave . . .” (CP 26)

Mr. Magee was accused of driving the wrong way in the eastbound lanes State Route 512. The Trooper acknowledges that the only basis for the suspicion that Mr. Magee was driving the wrong way were “reports.”³ Placing *Campbell* deeply on point, these “reports” and the content thereof, (if they existed at all) were never produced.

Further preventing Respondent from escaping it’s reasoning, *Campbell* states “the citizen did describe and point out the automobile to the officer.” *Id.* In the case against Mr. Magee, we have no idea who the citizen(s) was, or if they identified Mr. Magee’s car, much less point it out. There was no way to connect Mr. Magee’s car, apart from any other of the hundreds-if not thousands-of cars, present on State Route 512 that

³ Reference and introduction of these “reports” were objected to as hearsay, (in fact, double-hearsay,) and as presented as testimony of a witness, were objected to as violation of discovery. Mr. Magee timely and properly submitted a demand for discovery, which pursuant to IRLJ 3.1(b), entitled Mr. Magee to be provided a “list of the witnesses the plaintiff intends to call at the hearing” As hearsay, and in violation of a timely and proper discovery request, these statements were inadmissible.

morning. The Trooper only observed a particular car *parked* the shoulder on the on-ramp lane, and never saw Mr. Magee's car moving, much less in the lanes of State Route 512, much less, going the wrong way, and "observed no conduct indicative of *driving*" the wrong way. *Id.* (emphasis added)

Mr. Magee, submits that *Campbell*, and the violation thereof, requires reversal of the Superior Court's affirmation of the District Court.

3. Pursuant to RAP 2.3(d)(1), Mr. Magee was alleged to have violated RCW 46.61.150 (Wrong Way on Freeway.) The RCW, however, also includes RCW 46.61.155 (Wrong way on freeway access). The District Court used two (at least) alternative theories for violation of RCW 46.61.150. Under *Davis v. Microsoft Corp.*, 149 Wn. 2d 521, 70 P.3d 126 (2003), a second theory cannot be heard at the same time and mandates remand.

Davis states, “in cases such as the present one, where a *general* verdict is rendered in a *multi-theory* case and one of the theories is later invalidated, remand must be granted . . .” *Davis*, 149 Wn.2d at 539 (emphasis added)

Justice Owens, writing for the Supreme Court in *Davis*, identifies the single violation of law alleged to have been violated by the defendant, Microsoft Corporation, stating, “Thomas Davis sued his employer, Microsoft Corporation, alleging disability discrimination under the Washington Law Against Discrimination [WLAD], chapter 49.69 RCW” *Davis*, at 525 Justice Owens then states clearly that Mr. Davis’s single claim of violation of the singular and specific RCW by Defendant Microsoft Corporation, was then sub-divided into two alternative theories, “Davis argued two theories: first, that the WLAD required Microsoft to alter his job duties . . . and, second, that Microsoft’s efforts to

accommodate him . . . had been inadequate.” *Davis*, at 525. On October 27, 2000, “The jury returned a general verdict for Davis.” *Id.* at 530

Under the section titled “*Validity of General Verdict*,” Justice Owens states, “From the jury’s *general* verdict in Davis’s [Plaintiff] favor, one possible inference is that the jury found that Davis had proved only the first theory. Because the jury may have based its verdict solely on the invalidated theory, the Court of Appeals concluded that remand was *necessary* for trial on the second theory. That conclusion is consistent with prior appellate decisions in Washington.”⁴ *Id.* at 539 (emphasis added)

⁴ “*Easley*, 99 Wn. App. at 472 (“uncertainty” as to basis for jury’s defense verdict “is fatal to the verdict” and necessitates remand); *Erwin v. Roundup Corp.*, 110 Wn. App. 308, 317, 40 P.3d 675 (2002) (“uncertainty as to the basis for the jury’s [defense] verdict requires vacation of the judgment and remand for new trial”). Moreover, the principle is well grounded in federal case law. *See Maryland v. Baldwin*, 112 U.S. 490, 5 S. Ct. 278, 28 L. Ed. 822 (1884) (vacating general verdict for defense after one of its multiple defenses was found to be invalid); *Wilmington Star Mining Co. v. Fulton*, 205 U.S. 60, 79, 27 S. Ct. 412, 51 L. Ed. 708 (1907) (vacating general verdict for plaintiff when one of eight theories was invalidated). Under the so-called *Baldwin* principle, remand is mandatory because it is “simply improper for an appellate body to attempt to divine the defense or theory upon which the juryha[s] based its decision.” Ryan

Mr. Magee was alleged, specifically, to have violated RCW 46.61.525, which under IRLJ 6.2 is listed as “Wrong way on freeway” and carries a base penalty of \$177.00.

RCW 46.61.155, a separate violation, is listed under IRLJ 6.2 as “Wrong way on freeway access” and carries a lesser base penalty of \$82.00.

The District Court, acting as plaintiff, committed legal error when it followed the path that *Davis* reverses, sub-dividing the claim against Mr. Magee into two (or more) alternative theories. The District Court stated, “Perhaps there is a marked difference between [1] being on the shoulder or [2] being on the onramp or [3] being on actual 512. (CP 32) The District Court then goes on to say, “I’m not finding a distinction between [1] driving

Patrick Phair, *Appellate Review of Multi-Claim General Verdicts: The Life and Premature Death of the Baldwin Principle*, 4 J. APP. PRAC. & PROCESS 89, 94 (2002); see Elizabeth Cain Moore, *General Verdicts in Multi-Claim Litigation*, 21 MEMPHIS ST. U. L. REV. 705 (1991).” *Id.* at 539

on the shoulder and [2] driving on the actual paved highway of 512 or [3] even on onramp.” RP 9 As stated *supra*, the RCW, and IRLJ 6.2 makes an explicit distinction between, “[2] driving on the actual paved highway of 512 or [3] even on onramp.” RP 9

The two alternative theories are separate and distinct, as is made clear by the separate violations carrying different monetary penalties. Furthermore, and as pled before the Superior Court in Mr. Magee’s Motion for Reconsideration, the RCW is replete with distinctions that the District Court failed to recognize.⁵

⁵**RCW 46.04.197 – Highway** – Highway means the entire width *between the boundary lines* . . . when any part thereof is open to the use of the public for purposes of vehicular travel; As acknowledged by the District Court, and the Trooper, Mr. Magee was not between the boundary lines to be on the highway, but rather, outside those lines, on the shoulder.;

RCW 46.61.670 – Driving with wheels off roadway – states that there is a difference between “a public highway” as described *supra*, and driving “off the roadway thereof, except . . . for the *purpose of stopping off such roadway, or having stopped thereat.*” (emphasis added) This RCW, *i.e.*, law, does make a distinction between driving on or off what RCW 46.04.197 (*supra*) defines as the highway. Mr. Magee was cited for driving the wrong way on the highway. It was acknowledged by the Trooper, and the District Court, and, for that matter, Mr. Magee, that Mr. Magee was only ever pointed the wrong way *off* the roadway, and on the shoulder.

More importantly, however, and consistent with Mr. Magee’s testimony, and the completely corroborating sworn testimony of Mr. Hershey, RCW 46.61.670 explicitly provides that if upon driving off the roadway for the

The District Court, following exactly the flawed reasoning *Davis* reverses, then, makes its finding based on the most *general* proposition, stating, "I think you were doing *something* that a reasonably prudent person wouldn't do." (CP 32) (emphasis added)

Davis interfaces with the facts of Mr. Magee's case precisely, and pursuant to RAP 2.3(d)(1), establishes a conflict with a decision of the Supreme Court. It is requested, therefore, that this Court reverse the Superior Court's affirmation of the District Court's decision.

purpose of stopping or having stopped thereat, a person would be *in compliance* with the law, not in violation thereof. Mr. Magee could not have done anything else other than come to a stop thereat: he was nose-to-nose with Mr. Hershey's car. The District Court's finding would require this law to be overlooked;

RCW 46.04.500 – Roadway - which states, "'Roadway' means that portion of a *highway* . . . used for vehicular travel, *exclusive of the sidewalk or shoulder* . . ." Again, if Mr. Magee was to have admitted to parking his car safely pointed the wrong direction on the *shoulder*, then that is not the same as using *portion of a highway*. This is a distinction the District Court's reasoning overlooked.

RCW 46.61.428 – Slow moving vehicle driving on shoulders, when - The title of this RCW requires no more analysis for it to be conclusive that there is a specific legal distinction between the lanes of a highway, and the shoulder. The District Court's reasoning and finding were in direct contradiction with the law.

RCW 46.61.575 – Additional Parking Regulations - This RCW states, ". . . every vehicle stopped or parked upon a one-way roadway shall be so stopped or parked parallel to the curb or edge of the roadway, in the direction of authorized traffic movement" and also states that it applies, "with respect to *highways* under his or her [secretary of transportation] jurisdiction."

4. Dismissal with costs/deferred finding-is a procedural alternative that was not made available to Mr. Magee, it was not mentioned among the alternatives listed on his citation, nor was a review for qualification performed by the District Court, nor at any time did Mr. Magee waive this procedural alternative.

The preamble of a document explicitly stating the procedural requirements that would apply at his contested hearing was sent to Mr. Magee by the District Court. This is noteworthy, for Respondent has asked the Superior Court, and now this Court to overlook it's procedural failures for filing a brief, and the resulting prejudice, whereas, the District Court, the Superior Court, the rules of procedure, and this Court all have seen fit to state the applicable rules regarding timing.⁶

⁶ It should be noted that this document indicates the importance the District Court (along with the Superior Court Rules, the Rules of Appellate Procedure, and the State Supreme Court) places on such compliance with rules of procedure. A-10 states clearly that, "**Failure to Appear/Pay/Respond:** Failure to respond . . . will *automatically* increase the monetary penalty." (A- 4) (emphasis added)

The preamble finishes by informing Mr. Magee that, “The Court has set an ‘in person hearing’ as shown on the enclosed Notice of Hearing. You have the following options: . . . **Dismissal with costs:** The *court will review your case for a possible deferred finding* . . . This is *available* if you make a personal appearance . . .” (A-9) (emphasis added)

Mr. Magee made his personal appearance. The District Court did not conduct a review. Mr. Magee was denied this procedural alternative, constituting qualification for Discretionary Review pursuant to RAP 2.3(d)(3)(4).

Additionally, Respondent represented, orally, to the Superior Court, that Mr. Magee waived and was estopped from being granted this option. The Supreme Court for the State of Washington in *Ferndale v. Friberg*, 107 Wn. 2d 602, 732 P.2d 143 (1987) states that, “Waiver is defined as the intentional and voluntary

relinquishment of a known right in existence at the time of the waiver. The act of waiver must be inconsistent with any other intent than to waive the right.” *Ferndale v. Friberg*, 107 Wn. 2d 602 (internal citations omitted)

The Record of Proceedings is devoid of any action taken by Mr. Magee constituting a waiver. When considered in light of the District Court’s explicit indication to a person requesting a contested hearing that a procedural act would be conducted, and without any act taken by Mr. Magee, it is requested that the reasoning of *Ferndale* be applied and it be declared that, “neither waiver nor estoppel applies to the specific acts or omissions of [Mr. Magee] the respondents.” 107 Wn. 2d 602 Mr. Magee, therefore, respectfully requests that this Court reverse the affirmation by the Superior Court of the District Court’s decision.

5. Pursuant to IRLJ 3.1(b), providing for proper discovery, Mr. Magee is to be provided with the name

and address of witness the state may use to introduce testimony. The Trooper who stopped/detained and issued Mr. Magee a citation did so based on “reports” from alleged witness(es.)

IRLJ 3.1(b) states, “Upon written demand of the defendant [Mr. Magee]. . . plaintiff’s [the State’s] lawyer shall at least 7 days before the hearing provide the defendant [Mr. Magee] or defendant’s lawyer with a list of the *witnesses* the plaintiff intends to call at the hearing . . .” IRLJ 3.1(b) (emphasis added)

Mr. Magee timely and properly filed a demand for discovery with the District Court, wherein it is requested that the State provide “The names, addresses, and telephone number of all *witnesses* known to have relevant information by the Prosecution, . . . All incident reports, supplemental reports, officer reports, field notes, *witness statement(s)* . . .” (CP 16-18) (A-10) (emphasis added)

Although timely and properly objected to as hearsay, (CP 25, 28) and as not provided in response to Mr. Magee's discovery demand, the alleged statements of the alleged witness(es) to what Mr. Magee was alleged to have done, were admitted as the testimony of that witness(es.) The State, therefore, was in violation of IRLJ 3.1(b). Moreover, and as contained in Mr. Magee's appellant brief timely and properly filed before the Superior Court, Mr. Magee again argues that if the name/address/phone number of the alleged witness(es) were provided, that they would enable Mr. Magee to be exonerated. (CP 5-15)

6. Pursuant to RCW 46.61.575 (Additional Parking Regulations,) a car must be parked in the same direction as the flow of traffic, and applies to streets, as well as highways. Mr. Magee was never witnessed, and never conceded to doing anything else other than being parked.

At best, therefore, Mr. Magee committed a non-traffic infraction.

Revealed in the Record of Proceedings is the reality that the Trooper herself possessed no independent, first-hand evidence of what Mr. Magee was alleged to have done. There was no evidence, as required by law, to stop Mr. Magee, nor issue him a citation for the alleged offense. (CP 26-30)

7. The Trooper's testimony alleged that Mr. Magee had driven to Benston Drive on Highway 512, and thereupon turned around and drove the wrong direction in the lanes of Highway 512. (CP 28-29)

This is factually, and circumstantially impossible. The layout of Highway 512, and its connection to Highway 167, dictates that for Mr. Magee to be going the wrong way on Highway 512 where he was alleged to have been, he would have, at the earliest, had to have entered from miles away, somewhere in downtown

Sumner. From there, Mr. Magee would have had to have traveled the wrong way onto Highway 167, then proceed through the Highway 167/512 interchange, and then travel again some distance to be located where he was found. This would *have* to be the case based on the allegations of the Trooper. The only plausible explanation, and alternative, is what Mr. Magee admitted to, which was not what he was alleged to have done.

FATAL PROCEDURAL ERROR

8. Mr. Magee timely and properly filed his Motion for Discretionary Review with this Court on January 20, 2006. The Court of Appeals Division II State of Washington mailed a letter dated January 30, 2006, (A-5) to Mr. Magee, Defendant-Appellant, and to the State of Washington, Plaintiff-Respondent, acknowledging the timely and properly filed Motion for Discretionary Review by Mr. Magee on January 20, 2006.

In this same letter, the Court - in no uncertain terms - notifies Plaintiff-Respondent that, "A response to the motion must be filed within 15 days of the filing of the motion. **Filing a response is mandatory.**" (A-5)

When computed, the date a response was due, was February 4, 2006, a Saturday. By rule, Plaintiff-Respondent, would have the date due moved to the following business day, Monday, February 6, 2006. As of February 6, 2006, Mr. Magee had not received a Response from Respondent in violation of the Court's specific instructions which stated:

(a) Service. Except when a rule requires the appellate court commissioner or clerk or the trial court clerk to serve a particular paper, and except as provided in rule 9.5, a person filing a paper **must, at or before the time of filing, serve a copy of the paper on all parties**

RAP 18.5(a) (emphasis added)

It cannot be shown that Mr. Magee was served a copy on that same day. Respondent, therefore, is in violation of RAP 18.5(a).

RAP 18.5(a) provides that, "Service must be made as provided in CR 5(b), (f), (g), and (h)." RAP 18.5(a)

CR 5(b) provides that:

(2) *Service by Mail.*

(A) How Made. If service is made by mail, the papers shall be deposited in the post office addressed to the person on whom they are being served, with the postage prepaid. The service shall be deemed complete upon the third day following the day upon which they are placed in the mail . . .

CR 5(b) (emphasis added)

The explicit instructions of this Court contained in the January 30, 2006 letter states explicitly that, "Counsel are cautioned to review the RAP's for other applicable rules." (A-5, p.2)

RAP 18.5(a) directs that CR 5(b) shall be followed. CR 5(b) first directs that if service is not made in person, that service may be made by way of the post office. Plaintiff-Respondent did not use the post office to have delivered to Mr. Magee a copy of a Response. Instead, Plaintiff-Respondent used a private carrier,

departing from the explicit rule that Plaintiff-Respondent was cautioned to follow.

If the Court sees fit to look beyond this violation, CR 5(b) states explicitly, *supra*, that service is deemed completed the third day after placing a Response in the mail.

Plaintiff-Respondent placed a Response in the possession of a private carrier on February 6, 2006, the last day that Mr. Magee could be timely and properly served. CR 5(b) mandates that Mr. Magee would not then be served until February 9, 2006, (a week-day.) In no uncertain terms, February 9, 2006, as a date Mr. Magee would be served, puts Plaintiff-Respondent in violation of CR 5(b), and in violation of the Court's explicit instructions that Mr. Magee must be served by February 6, 2006.

In the January 30, 2006 letter from this Court, both Mr. Magee, and Plaintiff-Respondent are not only given

explicit instructions to follow, but have brought to their attention the dispositive nature of a failure to comply.

The letter states:

PLEASE NOTE:

Both a motion for discretionary review and a *response are required*. This court *will dismiss* the case or sanction counsel for failing to *timely* file these pleadings. *See* RAP 18.9. Requests for extensions of time *must* be made by motion and affidavit showing good cause.

(designate this one also) (A-5) (emphasis added)

Timely and proper filing of a document pursuant to RAP 18.5(a) has not been completed. Plaintiff-Respondent, therefore, has violated the overt, explicit, instructions of the Court to comply with the RAP. Mr. Magee, therefore, asks that this Court impose sanctions against Plaintiff-Respondent to include, but not limited to, preclusion of the filing of a Response to Motion for Discretionary Review. Mr. Magee then moves this Court to consider and grant his motion for discretionary review

and appeal unopposed by State of Washington, Plaintiff-Respondent.

In support of this motion, Mr. Magee submits that the failure to timely and properly file papers with this Court, is a pattern of behavior by Plaintiff-Respondent. Specifically, Mr. Magee refers to the content of his Motion to Set Matter Before Superior Court (Unopposed,) documenting the gross and willful violation of the RALJ rules when this matter was brought before the Superior Court. (CP 46-52) (A-2)

As of February 6, 2006, Mr. Magee, Defendant-Appellant, had not been served, nor had indicated, that a filing of a copy of a Response with this Court had been completed in accordance with this Court's explicit instructions to do so. At the time of this violation of the Court's explicitly stated and clearly communicated rule(s), Respondent, with the responsibility to acknowledge and declare their violation to this Court,

remained silent, and filed a "Response" with the Court.

Mr. Magee brought this to the attention of this Court.

Respondent responded by filing a declaration with a sworn – under penalty of perjury – statement contained therein, stating that the service and filing was timely, and that the U.S. Mail had been used. Sadly, the physical evidence, (records of Pierce County, UPS, and Mr. Magee's office) belies Respondents sworn statement.

(A-6, 7, 8)

9. Respondent grossly violated of RALJ 7.2(b) and RALJ 10.3, by filing a brief late, and without being granted an extension to do so.

Respondent sent a letter dated July 26, 2005 to Mr. Magee, and the Superior Court acknowledging notice of Mr. Magee's RALJ appeal. (CP 4) (A-4) Respondent set forth a strict standard it would ask the Superior Court to apply to Mr. Magee for a brief that might be filed beyond the deadline, and the procedure for being granted an

extension. But it was Respondent who failed, grossly, to timely file its brief, nor was an extension under RALJ 10.3 pursued. Three days before this matter was originally to be heard, Mr. Magee received a recorded telephone message from Respondent acknowledging violation of RALJ 7.2(b). Respondent, instead of submitting itself to the dispositive standard acknowledged in its letter for violation of RALJ 7.2(b) and RALJ 10.3, attempted to circumvent their responsibility by shifting Respondent's responsibility, by suggesting to Mr. Magee that he should bear the burden of this violation, and that *Mr. Magee* should ask for an continuance. Respondent also indicated that a "brief", albeit in violation of RALJ 7.2(b) and RALJ 10.3, from it would be served and filed by October 28, 2005, the date originally set for this matter to be heard and action taken. Respondent, however, failed to serve and/or file a brief as it assured would be done. Knowingly in violation of

RALJ 7.2(b) and RALJ 10.3, and absent disclosure to the Superior Court, Respondent served and filed a "brief".

When this matter was first heard, Mr. Magee, in accordance with Respondent's violation, and based on the strict application of those rules Respondent acknowledged as applicable to the Superior Court, moved the Superior Court to find Respondent in violation of RALJ 7.2 and RALJ 10.3. Mr. Magee further moved the Superior Court to impose sanctions and terms under RALJ TITLE 10 - VIOLATION OF RULES – SANCTIONS AND DISMISSAL. Mr. Magee requested that his appeal be heard unopposed and that his time be compensated for.

Respondent, contrary to RALJ 10.3(b), and coming before the Superior Court only in response to Mr. Magee's motion, asked to be excused from any violation because of a two-week hospital stay. The Superior Court, (as understood by Mr. Magee) based on that

explanation, and in lieu of RALJ 10.3 requiring a written request to do so, allowed the “brief” of Respondent to be admitted as a Response Brief. Mr. Magee had been served this “brief” only three days before this hearing, and the Superior Court continued the hearing to allow Mr. Magee to create, serve and file, a Reply Brief. In recognition of Respondent’s violation of the RALJ 7.2(b) and RALJ 10.3, and the need for the matter to be continued, the Superior Court initiated awarding terms to Mr. Magee for the additional time/expense incurred due to Respondent’s violation. At no time was Mr. Magee’s motion finally ruled on. Mr. Magee timely served and filed a Reply Brief. (RP 53-9) Mr. Magee, additionally, and pursuant to Respondent’s violation of RALJ 7.2(b) (and consistent with RALJ 10.3 providing for a written response to a request by an opposing party for a request for extension,) submitted a written response establishing

the insufficiency of Respondent's excuse for violation of RALJ 7.2(b) and RALJ 10.3.

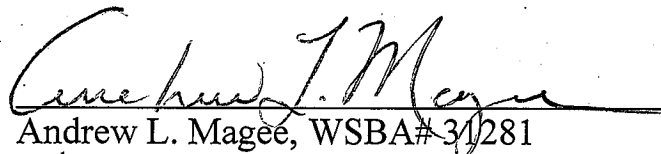
V CONCLUSION

Mr. Magee was unlawfully detained, unlawfully issued a citation, and was subject to a violation of his due process rights, and prejudiced by the allowance of procedural violations on the part of Respondent based on allegations that themselves are impossible to have existed in reality.

Mr. Magee, therefore, respectfully submits and requests that this Court reverse the affirmation of the Superior Court of the District Court's decision.

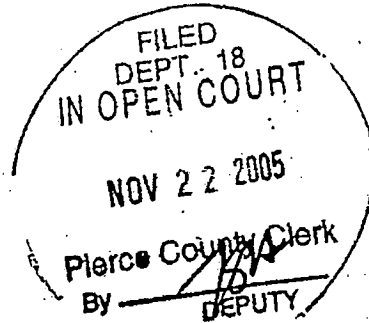
Respectfully submitted this 9th day of October, 2006

Michelle Hyer
Deputy Prosecuting Attorney
Criminal Felony Division
930 Tacoma Avenue South, Room 946
Tacoma, Washington 98402-2171

A handwritten signature in cursive script, appearing to read "Andrew L. Magee", written over a horizontal line.

Andrew L. Magee, WSBA# 31281
44th Floor
1001 Fourth Avenue Plaza
Seattle, Washington 98154
(206) 389-1675

APPENDIX



IN THE SUPERIOR COURT
OF THE STATE OF WASHINGTON
IN AND FOR PIERCE COUNTY

STATE OF WASHINGTON

Respondent,

v.

ANDREW L. MAGEE

Appellant.

NO. 05-2-09617-4

ORDER ON RALJ APPEAL REMAND
DC CAUSE # 5Y4346327

CLERK'S ACTION REQUIRED

THIS MATTER having come on regularly before the undersigned Judge of the above-entitled Court as an appeal from District Court No. 5Y4346327, on a finding of committed on one count of Negligent Driving in the Second Degree, RCW 46.61.525, in the above-entitled cause, and the Court being fully advised in the premises, now, therefore,

It is hereby ORDERED, ADJUDGED and DECREED:

1. The finding of committed by the trial court is ☒ affirmed [] denied, and this cause is remanded for

☒ imposition of monetary penalty [] dismissal of the charge.

2. The reason for this Court's rulings:

There was sufficient evidence to find "committed" on the infraction; There was no discovery or due process violation.

3. Upon conviction or plea of guilty, upon failure to prosecute an appeal from a court of limited jurisdiction as provided by law, or upon affirmance of conviction by a court of limited jurisdiction, a defendant in a criminal case shall be liable for a fee of one hundred ten dollars. [RCW 36.18.020(2)(h)]

DONE IN OPEN COURT this 22 day of Nov., 2005

JUDGE

Presented by:
GERALD A. HORNE
Pierce County
Prosecuting Attorney

P. GRACE KINGMAN
Deputy Prosecuting Attorney
WSB # 16717

ANDREW L. MAGEE, Pro se
WSB# 31281

FILED
DEPT. 18
IN OPEN COURT

NOV 22 2005

Pierce County Clerk
By DEPUTY



05-2-09617-4 24185837 ORDYMT 12-12-05

FILED
DEPT. 18
IN OPEN COURT

DEC - 3 2005

Pierce County Clerk
By [Signature]
DEPUTY

IN THE SUPERIOR COURT OF WASHINGTON, COUNTY OF PIERCE

State of WA
Plaintiff(s) / Respondent

Cause No: 05-2-09617-4

ORDER

vs.

Andrew Magee
Defendant(s) / Appellant

Defendant's motion for reconsideration
is hereby denied.

DATED this 9 day of Dec, 2005

[Signature]
Judge BEVERLY G GRANT

[Signature]
Attorney for Plaintiff(s)
WSBA# 166717

[Signature]
Attorney for Defendant(s) / pro se
WSBA# _____

A-2

INFRACTION

☒ TRAFFIC

☐ NON-TRAFFIC

I 4346327

IN THE ☒ DISTRICT ☐ MUNICIPAL COURT OF

☐ STATE OF WASHINGTON

PLAINTIFF VS. NAMED DEFENDANT

☒ COUNTY OF

☒ CITY/TOWN OF

PIERCE 01/03

WA027013T

L.E.A. ORI #:

WAWSP

00

COURT ORI #:

THE UNDERSIGNED CERTIFIES AND SAYS THAT IN THE STATE OF WASHINGTON

| | | | | | | | |
|---|--|----------------|--|----------------|--|---|--|
| DRIVER'S LICENSE NO. | | STATE | | EXPIRES | | PHOTO I.D. ON PERSON | |
| MAGEE AL 380MG | | WA 05 | | | | <input checked="" type="checkbox"/> YES <input type="checkbox"/> NO | |
| NAME: LAST | | FIRST | | MIDDLE | | | |
| MAGEE | | ANDREW | | LUKE | | | |
| ADDRESS | | | | | | | |
| 4104 E. EDgewater PL # 153A | | | | | | | |
| <input checked="" type="checkbox"/> IF NEW ADDRESS <input type="checkbox"/> PASSENGER | | | | | | | |
| CITY | | STATE | | ZIP | | LOCATION | |
| SEATTLE | | WA | | 98112 | | | |
| DATE OF BIRTH | | RACE | | SEX | | HEIGHT | |
| 07/07/62 | | W | | M | | 6'1" | |
| WEIGHT | | EYES | | HAIR | | | |
| 208 | | BLU | | BRN | | BLK | |
| RESIDENTIAL PHONE NO. | | CELL/PAGER NO. | | WORK PHONE NO. | | | |
| | | | | | | | |
| VIOLATION DATE | | MONTH | | DAY | | YEAR | |
| 04 | | 09 | | 05 | | | |
| ON OR ABOUT | | TIME | | 24 HOUR | | INTERPRETER NEEDED | |
| | | 1150 | | | | <input type="checkbox"/> | |
| AT LOCATION | | M.P. | | CITY/COUNTY OF | | LANG: | |
| EB SFS12 <-> BENSON DR | | PIONEER | | PIERCE | | | |

DID OPERATE THE FOLLOWING VEHICLE/MOTOR VEHICLE ON A PUBLIC HIGHWAY AND

| | | | | | | | | | | | | | | | |
|------------------------------------|--|-------|--|---------|--|----------|--|------------------------|--|-------|--|---------|--|---------|--|
| VEHICLE LICENSE NO. | | STATE | | EXPIRES | | VEH. YR. | | MAKE | | MODEL | | STYLE | | COLOR | |
| 752LOT | | WA 05 | | 87 | | SUBGL | | SW | | 9704 | | | | | |
| TRAILER #1 LICENSE NO. | | STATE | | EXPIRES | | TR. YR. | | TRAILER #2 LICENSE NO. | | STATE | | EXPIRES | | TR. YR. | |
| | | | | | | | | | | | | | | | |
| OWNER/COMPANY IF OTHER THAN DRIVER | | | | | | | | | | | | | | | |
| Same | | | | | | | | | | | | | | | |
| ADDRESS | | CITY | | STATE | | ZIP CODE | | | | | | | | | |
| | | | | | | | | | | | | | | | |

| | | | | | | | | | | | | | | | |
|--|--|-------------------------------------|--|------------------------------|--|----------------------------------|--|------------------------------|--|----------------------------------|--|-------------------------------|--|--------------------------------|--|
| <input checked="" type="checkbox"/> ACCIDENT | | <input type="checkbox"/> COMMERCIAL | | <input type="checkbox"/> YES | | <input type="checkbox"/> HAZARD | | <input type="checkbox"/> YES | | <input type="checkbox"/> EXEMPT | | <input type="checkbox"/> FARM | | <input type="checkbox"/> FIRE | |
| <input type="checkbox"/> NO | | <input type="checkbox"/> VEHICLE | | <input type="checkbox"/> NO | | <input type="checkbox"/> PLACARD | | <input type="checkbox"/> NO | | <input type="checkbox"/> VEHICLE | | <input type="checkbox"/> R.V. | | <input type="checkbox"/> OTHER | |

DID THEN AND THERE COMMIT EACH OF THE FOLLOWING OFFENSES

| | | | | | | | | | | | | | |
|---------------------------|--|---------------|--|------|--|------|--|------------------------------|--|-------------------------------|--|--------------------------------|--|
| #1 VIOLATION/STATUTE CODE | | VEHICLE SPEED | | IN A | | ZONE | | <input type="checkbox"/> SMD | | <input type="checkbox"/> PACE | | <input type="checkbox"/> AIRCR | |
| 46.61.525 | | | | | | | | | | | | | |

NEGLIGENT DRIVING -
2ND DEGREE

| | |
|---------------------------|--|
| #2 VIOLATION/STATUTE CODE | |
|---------------------------|--|

WRONG WAY ON SFS12

| | |
|---------------------------|--|
| #3 VIOLATION/STATUTE CODE | |
|---------------------------|--|

REC'D PCDC APR 11 2005

PENALTY U.S. \$ 538 -

DATE ISSUED 070905

WITHOUT ADMITTING TO HAVING COMMITTED EACH OF THE ABOVE OFFENSES, BY SIGNING THIS DOCUMENT I ACKNOWLEDGE RECEIPT OF THIS NOTICE OF INFRACTION AND PROMISE TO RESPOND AS DIRECTED ON THIS NOTICE.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT HAVE ISSUED THIS ON THE DATE AND AT THE LOCATION ABOVE, THAT I HAVE PROBABLE CAUSE TO BELIEVE THE ABOVE NAMED PERSON COMMITTED THE ABOVE OFFENSE(S), AND MY REPORT WRITTEN ON THE BACK OF THIS DOCUMENT OR ATTACHED TO THIS INFRACTION IS TRUE AND CORRECT.

[Signature]
DEFENDANT'S SIGNATURE

[Signature] 1167
OFFICER

| INFRACTION | | | | | | |
|----------------|----------|-------------|---------|-----------|-----------|-------------------------|
| INF | RESPONSE | DISPOSITION | PENALTY | SUSPENDED | SUB-TOTAL | FNDG/JDGT DATE |
| 1 | C NC | C NC D P DF | \$ | \$ | \$ | ABSTRACT MLD TO OLYMPIA |
| 2 | C NC | C NC D P DF | \$ | \$ | \$ | |
| 3 | C NC | C NC D P DF | \$ | \$ | \$ | |
| TOTAL COSTS \$ | | | | | | |

WASHINGTON UNIFORM COURT DOCKET - COURT COPY
WASHINGTON UNIFORM COURT DOCKET - DOL COPY

January 2003
January 2003

A-3

9A 101 20675 9/8/2005 00023

INFRACTION ☒ TRAFFIC ☐ NON-TRAFFIC I 4346327

IN THE ☒ DISTRICT ☐ MUNICIPAL COURT OF TACOMA, WASHINGTON

☐ STATE OF WASHINGTON, PLAINTIFF VS. NAMED DEFENDANT

☐ COUNTY OF PIERCE

☐ CITY/TOWN OF PIERCE 01/03 WA027013J (a)

L.E.A. ORI #: WAWSP 00 COURT ORI #:

THE UNDERSIGNED CERTIFIES AND SAYS THAT IN THE STATE OF WASHINGTON

DRIVER'S LICENSE NO. MAGEE AL 380MG WA 05 STATE WA EXPIRES PHOTO I.D. ON PERSON ☒ YES ☐ NO

NAME: LAST MAGEE, FIRST ANDREW, MIDDLE LUKE

ADDRESS 4104 E. EXETER PL # 1534 IF NEW ADDRESS ☒ YES ☐ NO

CITY SEATTLE WA 98122 EMPLOYER LOCATION

DATE OF BIRTH 07/07/62 RACE SEX HEIGHT 208 EYES BLN HAIR BLO

RESIDENTIAL PHONE NO. CELL/PAGER NO. WORK PHONE NO.

VIOLATION DATE 04 09 05 TIME 1150 INTERPRETER NEEDED ☐ YES ☒ NO

ON OR ABOUT 04 09 05 24 HOUR LANG:

AT LOCATION EB SR512 < BOSTON DR. PIONEER PIERCE

DID OPERATE THE FOLLOWING VEHICLE/MOTOR VEHICLE ON A PUBLIC HIGHWAY AND

VEHICLE LICENSE NO. 752LOT STATE WA 05 EXPIRES 07 05 MAKE SUBBU MODEL SW - 874

TRAILER #1 LICENSE NO. STATE EXPIRES TR. YR. TRAILER #2 LICENSE NO. STATE EXPIRES TR. YR.

OWNER/COMPANY IF OTHER THAN DRIVER SAME

ADDRESS CITY STATE ZIP CODE

ACCIDENT ☒ YES ☐ NO COMMERCIAL ☐ YES ☒ NO HAZARD ☐ YES ☒ NO EXEMPT ☐ FARM ☐ FIRE ☐ R.V. ☐ OTHER

DID THEN AND THERE COMMIT EACH OF THE FOLLOWING OFFENSES

#1 VIOLATION/STATUTE CODE 46.61 525 VEHICLE SPEED IN A ZONE ☐ SMD ☐ PACE ☐ AIRCRP

NEGLIGENT DRIVING - 2ND DEGREE

#2 VIOLATION/STATUTE CODE

WONG WAY ON SR512 *

#3 VIOLATION/STATUTE CODE

PENALTY U.S. \$ 538 -

DATE ISSUED 070905

REC'D PCDC APR 11 2005

WITHOUT ADMITTING TO HAVING COMMITTED EACH OF THE ABOVE OFFENSES, BY SIGNING THIS DOCUMENT I ACKNOWLEDGE RECEIPT OF THIS NOTICE OF INFRACTION AND PROMISE TO RESPOND AS DIRECTED ON THIS NOTICE.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT HAVE ISSUED THIS ON THE DATE AND AT THE LOCATION ABOVE, THAT I HAVE PROBABLE CAUSE TO BELIEVE THE ABOVE NAMED PERSON COMMITTED THE ABOVE OFFENSE(S), AND MY REPORT WRITTEN ON THE BACK OF THIS DOCUMENT OR ATTACHED TO THIS INFRACTION IS TRUE AND CORRECT.

DEFENDANT'S SIGNATURE [Signature] OFFICER [Signature] 1167

| ABSTRACT OF JUDGMENT | INFRACTION | | | | | | FNDG/JDGT DATE |
|----------------------|------------|----------|-------------|---------|-----------|-----------|----------------|
| | INF | RESPONSE | DISPOSITION | PENALTY | SUSPENDED | SUB-TOTAL | |
| | 1 | C NC | C NC D P OF | \$ | \$ | \$ | |
| | 2 | C NC | C NC D P OF | \$ | \$ | \$ | |
| | 3 | C NC | C NC D P OF | \$ | \$ | \$ | |
| TOTAL COSTS \$ | | | | | | | |

WASHINGTON UNIFORM COURT DOCKET - COURT COPY

WASHINGTON UNIFORM COURT DOCKET - DOL COPY

January 2003

January 2003

PACE

I observed the defendant in excess of the well-posted speed limit. I paced the defendant for approximately _____ mile(s). I maintained a constant distance of approximately _____ car lengths. I paced the defendant at a speed of _____ MPH. My patrol car speedometer is checked for accuracy every 90 days by RADAR. It was last checked on _____ with _____ RADAR unit. The speedometer is checked at the speeds of 30 and 60 MPH.

RADAR

I observed the defendant approaching my location in excess of the _____ MPH posted speed limit. I obtained a high audio signal as the defendant entered the RADAR. I obtained a reading of _____ MPH. The defendant was the only vehicle in the RADAR beam at the time I obtained the above reading. The calibration of _____ R _____ a / Trooper / KR 11 / Falcon Radar unit, was checked internally and externally by as assigned tuning fork at the start and end of my shift. The above RADAR unit was functioning properly and was in good working order at the time the above speed was obtained on the defendant. I was trained and certified on the RADAR at the WSP academy. Tuning fork numbers # _____

LASER

I observed the defendant approaching/receding my location in excess of the posted speed limit. I obtained a _____ MPH reading on the defendant's vehicle at the distance of _____ feet. The LTI 20-20 / Kustom Pro Laser II / Laser III SMD, # L _____ has been certified by the factory and State Patrol Technicians and found to be in proper working order. On the day the above mentioned speed was obtained on the defendant, the LASER SMD's accuracy was checked by: (1) internal self diagnostic test, (2) scope alignment test, and (3) the fixed distance/zero velocity test at _____ feet prior to the beginning and end of my shift. I have been trained in the use and operation of the SMD device.

FOLLOWING TOO CLOSELY

I observed the defendant following a vehicle traveling to the front at a distance of approximately _____ feet while traveling at a speed of approximately _____ MPH.

SEATBELT/CHILD RESTRAINT

Upon and/or prior to contacting the defendant I noticed that:

- ☐ He/She was not wearing a seatbelt.
- ☐ I observed the defendant put on their seatbelt prior to/after being stopped
- ☐ A child less than 3 years of age was not properly restrained
- ☐ A child less than 10, but at least 3 years of age was not restrained
- ☐ A person less than 16, but at least 10 was not wearing a seat belt

VEHICLE LICENSE TABS

A DOL check of the defendant's vehicle showed the license tabs expired on _____

1902 96th Street South
Tacoma WA 98444
(253) 798-7474

POOR QUALITY
ORIGINAL

157
42

27



Pierce County

Office of Prosecuting Attorney

GERALD A. HORNE
Prosecuting Attorney

REPLY TO:
CRIMINAL FELONY DIVISION
930 Tacoma Avenue South, Room 946
Tacoma, Washington 98402-2171
Criminal Felony Records: (253) 798-6513
Victim-Witness Assistance: (253) 798-7400
(FAX) (253) 798-6636

Main Office: (253) 798-7400
(WA Only) 1-800-992-2456

July 26, 2005

Andrew Luke Magee
4104 Edgewater Place, Apartment 153
Seattle, Washington 98112

Re: State of Washington v. ANDREW LUKE MAGEE
No. 05-2-09617-4

Dear Mr. Magee:

Our office has received your notice of appeal in this matter. Pursuant to RALJ 7.2, the appellant's brief must be filed by September 8, 2005. Our response brief must be filed 30 days thereafter.

RALJ 6.3.1(a) also requires the appellant to file and serve a transcript of the trial court proceedings with the appellant's brief. The transcript will be returned to you upon completion of our brief.

If your brief and transcript are not filed by September 8, 2005, we will set this matter before Superior Court so that the Judge may take action. If you need an extension please contact our office prior to the above due date.

Sincerely,

P. GRACE KINGMAN
Deputy Prosecuting Attorney

cc: Superior Court

~~FILE~~ A-4



Washington State Court of Appeals

Division Two

950 Broadway, Suite 300, Tacoma, Washington 98402-4454

David Ponzoha, Clerk/Administrator (253) 593-2970 (253) 593-2806 (Fax)

General Orders, Calendar Dates, Issue Summaries, and General Information at <http://www.courts.wa.gov/courts>

January 30, 2006

Kathleen Proctor
Pierce County Prosecuting Atty Ofc
930 Tacoma Ave S Rm 946
Tacoma, WA, 98402-2171

Andrew L. Magee
1001 Fourth Ave Plaza 44th Fl
Seattle, WA, 98154

AMENDED

CASE #: 34261-8-II

Pierce County, Respondent v Andrew Magee, Petitioner

Re: Pierce County. No. 05-2-09617-4

Case Manager: Sandy

Dear Counsel:

A Notice for Discretionary Review filed January 5, 2006 has been received and assigned No. 34261-8-II.

The time periods for complying with the Rules of Appellate Procedure are as follows:

1. A Motion for Discretionary Review was filed with the clerk of this court **January 20, 2006.**
2. According to this court's General Order 05-1, effective May 9, 2005, a commissioner of this court will consider the merits of the motion for discretionary review without oral argument, unless the court, in its sole discretion, directs otherwise.
3. A response to the motion must be filed within 15 days of the filing of the motion. **Filing a response is mandatory.**
4. A reply, if filed, is due within 7 days after the response is filed.

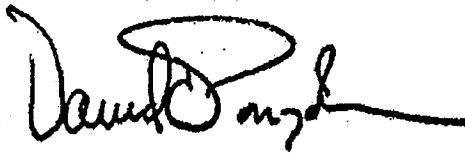
PLEASE NOTE:

Both a motion for discretionary review and a response are required. This court will dismiss the case or sanction counsel for failing to timely file these pleadings. *See* RAP 18.9. Requests for extensions of time must be made by motion and affidavit showing good cause.

~~FILE~~ A-5

Counsel are cautioned to review the RAPs for other applicable rules. A commissioner will consider the motion in the next term after it is filed.

Very truly yours,

A handwritten signature in black ink, appearing to read "David C. Ponzoha". The signature is fluid and cursive, with a large loop at the beginning and a long horizontal stroke at the end.

David C. Ponzoha,
Court Clerk

DCP:skw

cc: Pierce County Clerk

RECEIVED

RIDDELL WILLIAMS P.S.

FEB - 7 2006

AM

PM

789101112123456

A-6

BECKY WENSON
12531 798-7212
PIERCE COUNTY GENERAL SERVICES
2310 COMMERCE ST
TACOMA WA 98402

Pierce County

Gerald A. Horie
Prosecuting Attorney

930 Tacoma Avenue South, Room 946
Tacoma, Washington 98402-2171

SHIP TO:

ANDREW L. MAGEE
44TH FLOOR
1001 FOURTH AVE. PLAZA
SEATTLE WA 98154

1 OF 1

2 LBS

1001 4TH AVE

SEATTLE WA 98154-1119

P: YELLOW S: 3TB

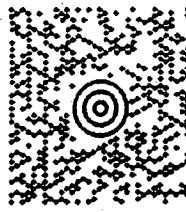
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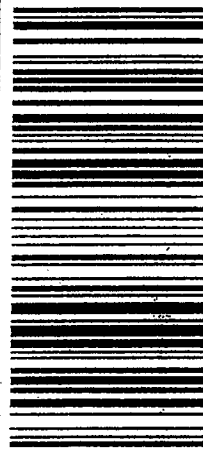
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WA 981 9-05



UPS GROUND

TRACKING #: 1Z 856 111 03 4429 4232



BILLING: P/P

REF 1: 121

UOH 8.8.14 UPS Thermal 2 51.0R 01/2006

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Track by Tracking Number

View Details

Status: Delivered
Delivered on: 02/07/2006 10:43 A.M.
Signed by: JANKOVIC
Location: MAIL ROOM
Delivered to: SEATTLE, WA, US
Shipped or Billed on: 02/06/2006

Tracking Number: 1Z 856 111 03 4429 423 2
Service Type: GROUND
Weight: 2.00 Lbs

Package Progress:

| Location | Date | Local Time | Activity |
|-----------------|------------|------------|------------------------------|
| SEATTLE, WA, US | 02/07/2006 | 10:43 A.M. | DELIVERY |
| | 02/07/2006 | 6:34 A.M. | OUT FOR DELIVERY |
| | 02/07/2006 | 3:44 A.M. | ARRIVAL SCAN |
| REDMOND, WA, US | 02/07/2006 | 3:16 A.M. | DEPARTURE SCAN |
| REDMOND, WA, US | 02/06/2006 | 10:49 P.M. | ARRIVAL SCAN |
| FIFE, WA, US | 02/06/2006 | 10:00 P.M. | DEPARTURE SCAN |
| | 02/06/2006 | 9:34 P.M. | ORIGIN SCAN |
| US | 02/06/2006 | 6:00 P.M. | BILLING INFORMATION RECEIVED |

Tracking results provided by UPS: 02/28/2006 1:01 P.M. Eastern Time (USA)

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A-7
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~~XXXXXXXXXX~~

Riddell Williams PS, REIVING LOG

| DATE | TIME | FOR | FROM | DELIVER TO | REC BY | SERVICE |
|------|-------|-------------|-------------------------------|------------|--------|---------|
| | 10:00 | W. Yoh | C. Koch | K. T. | VR | Red/As |
| | | W. Woodruff | Progers, Stenault | Wend | AD | Red/As |
| | | J. Smith | J. Smith | Smith | — | — |
| | | T. Bennett | Z. Conk | Terry | ↓ | ↓ |
| | | C. Smith | T. Harty | Courney | ↓ | ↓ |
| | | Conk | See front | Salen | — | AR |
| | | K. Leht | envelope? | Leht | — | — |
| | | C. West | K. West | West | — | — |
| | | K. Leht | horse | Leht | — | — |
| | | Alney (3) | — | Nancy | — | — |
| | | S. Bond | 11 NE 56 th Street | Thelma | — | Halco |
| | | Hoffman | USDC - Western Dist. | Hoffman | — | — |
| | | Young | Manhattan | Young | — | — |
| | | Hoffman | RLSC | Doris | — | — |
| | | K. Daniels | RLSC | Kay | — | — |
| | 10:25 | K. Tolson | A. Tolson | Qu | — | Red/As |
| | 11:00 | Young | Prison Wards | Young | — | — |
| | | — | — | — | — | — |
| | | Young | BNA Boon | Lab | — | CRS |
| | | A. Young | B. Henson | Andrew | — | — |
| | | Kirk Allen | R. Boyer | pink | — | — |

RECEIVED
RIDDLE WILLIAMS P.S.
FEB - 7 2006
AM 7 8 9 10 11 12 1 2 3 4 5 6 PM

A-8

CONTESTED HEARING

You have requested a contested hearing because you do not believe you committed the civil or traffic offense(s) you received. You may bring a lawyer at your own expense. You may present evidence and examine witnesses in court. You may request a witness list and a copy of the citing officer's sworn statement. You must make the request in writing at least 14 days before the hearing and the witness list and citing officer's sworn statement must be given to you at least 7 days before the hearing. You may request the Court to subpoena witnesses, including the officer who issued the citation. If you wish to subpoena a witness, you must advise the court at least 15 court days prior to the hearing. The Court will prepare the subpoena. You must serve the subpoena on the witness/officer at least 7 days before the hearing. This may be done through personal service or by first-class mail, postage prepaid, sent to the witness' last known address. You must file a Declaration of Service or other proof of service with the Court at the time of the hearing. There will be no jury at a contested hearing.

The Court has set an "in person hearing" as shown on the enclosed Notice of Hearing. You have the following options:

Personal Appearance: You and your witnesses must appear in person on the day/time scheduled on the Notice of Hearing. The Court shall consider the evidence and testimony presented and enter a finding. If the Court determines that you did commit the offense(s), the Department of Licensing will be notified, and this offense(s) will appear on your driving record. The Court may grant a reduction in the monetary penalty which will be based on the circumstances surrounding the offense and your driving record. Penalties are due on the day of the hearing. You should come prepared to pay.

Hearing by Mail: You may present your case to the court by mail. Please use the enclosed Hearing by Mail form and attach your statement. The Court must receive your statement/declaration by the date shown on the enclosed form. The Court shall consider your statement and the citing officer's report and enter a finding. If the Court determines that you did commit the offense(s), the Department of Licensing will be notified and this offense(s) will appear on your driving record. The Court may grant a reduction in the monetary penalty which will be based on the circumstances surrounding the offense and your driving record. You will be notified by mail of the court's decision, the penalty imposed, and the date the penalty is due.

Dismissal with costs: The court will review your case for a possible deferred finding which allows for a dismissal of the charge(s) with costs. This is available if you make a personal appearance or submit your statement by mail. Not all offenses are eligible for this deferred finding with dismissal. If eligible, the charge will be dismissed at the end of one year provided you do not commit any traffic offenses during this one year period and you pay the costs imposed by the due date. A person may receive only one deferral within a seven-year period for moving violations and only one deferral within a seven-year period for non-moving violations. A finding of committed will be entered if you receive a new traffic violation during the deferral period or you fail to pay the costs by the due date.

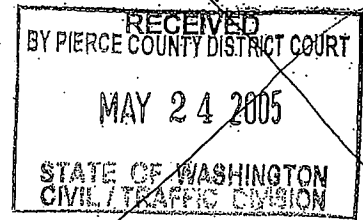
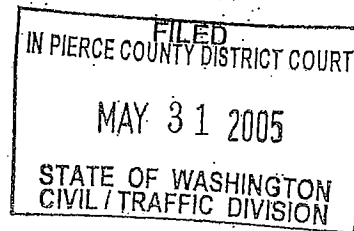
Hearing Date: The court must schedule your contested hearing within 120 days of the violation date unless otherwise agreed by the defendant in writing. "A defendant who objects to the hearing date set by the court upon the ground that it is not within the time limits prescribed by this rule shall file with the court and serve upon the prosecuting authority a written motion for speedy hearing date within 10 days after the notice of hearing is mailed or otherwise given to the defendant. Failure of a party, for any reason, to make such a motion shall be a waiver of the objection that a hearing commenced on such date is not within the time limits prescribed by this rule." (IRLJ 2.6(d))

Failure to Appear/Pay/Respond: Failure to respond, failure to appear at any hearing or failure to pay will automatically increase the monetary penalty. If this is a traffic violation, your driving privilege will be suspended until you have paid all penalties required by law. The Court will notify the Department of Licensing.

If you elect not to appear at the hearing and do not submit your written statement by the date specified, you must pay the penalty on or before the hearing date or a late penalty of \$52 will be added to the original amount due.

Please review the reverse side of this letter for possible monetary reductions. Proof must be filed with the Court within 120 days of the offense or at your hearing in order to qualify for the reduction.

You may appeal a committed decision from a contested hearing to Superior Court. The filing fee for the appeal is \$110. There is no appeal allowed from a decision on a written statement/declaration.



PIERCE COUNTY DISTRICT COURT NUMBER ONE
PIERCE COUNTY WASHINGTON
CIVIL & INFRACTIONS DIVISION

PIERCE COUNTY,
Plaintiff,

vs.

MAGEE, ANDREW,
Defendant.

CASE NO. 5Y4346327

NOTICE OF APPEARANCE AND
DEMAND FOR DISCOVERY

NOTICE OF APPEARANCE

PLEASE take notice that the defendant hereby enters his appearance.

Please direct all further discovery, motions, and correspondence to my
address.

The defendant enters a plea of not guilty; requests a jury trial, and
does not waive the ninety (90) day Speedy Trial Requirement.

A-10
~~AB~~

DEMAND FOR DISCOVERY

The defendant demands the Prosecutor provide the following discovery prior to the pre-trial set in this case:

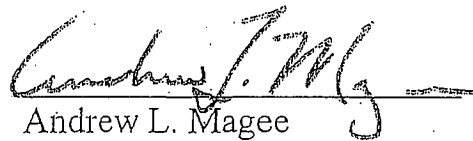
1. The names, addresses, and telephone numbers of all witnesses known to have relevant information by the Prosecution, especially witnesses the Prosecution intends to call at trial.
2. All incident reports, supplemental reports, officer reports, field notes, witness statement(s), and any other information the prosecution intends to use, possesses, or has access to regarding the above referenced case, including but not limited to Blood Alcohol Content test results, validation certification and driving records, if applicable.
3. A list of all items the Prosecution intends to use at trial as exhibits, including photographs, and to allow inspection of same.
4. Notice of knowledge by the Prosecutor of prior convictions on the part of the Defendant or any other potential witness involved in the case.
5. Disclosure of all exculpatory evidence or information favorable to the Defendant.

6. Disclosure of any and all investigator's contacts made by persons acting on behalf of the Prosecution including Domestic Violence Advocates or other Agent.

7. Other: 911 TAPE(S); CAD SHEET PRINTOUT(S);
VIDEOTAPE(S).

Failure to comply with these demands will result in appropriate defense motions including Motions to Dismiss.

Respectfully submitted this 31 th day of May, 2005


Andrew L. Magee